No. 1047

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Appellant,
vs.
BITTER ROOT DEVELOPMENT COMPANY (a corporation), ANACONDA MINING COMPANY (a corporation), ANACONDA COPPER COMPANY (a corporation), ANACONDA COPPER MINING COMPANY (a corporation), MARGARET P. DALY, MARGARET P. DALY, as executrix of the estate of Marcus Daly, deceased, JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON and DANIEL J. HENNESSY,
Appellees.

} In Equity

BRIEF AND ARGUMENT FOR APPELLEES.

W. W. DIXON, A. J. CAMPBELL, A. J. SHORES, C. F. KELLEY, JOHN F. FORBIS and L. O. EVANS,
of Butte, Montana, Solicitors and of Counsel for Appellees.

INTER MOUNTAIN, PRINTERS, BUTTE

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STATEMENT.

This is an appeal from the action of the lower court sustaining the demurrers of appellees to complainants' bill of complaint and dismissing the cause. Separate demurrers were filed and presented—one the Anaconda Copper

Mining Company, John R. Toole, William W. Dixon, William Scallon and Daniel J. Hennessy; and another by Margaret P. Daly, and Margaret P. Daly, as executrix of the Last Will and Testament of Marcus Daly, deceased. The questions raised by the two demurrers are so similar that, for convenience, we will present them together in this brief.

In appellant's brief it is stated that the Bitter Root Development Company, Anaconda Mining Company and Anaconda Copper Mining Company, which had not been served, and did not appear in the action, have no offices or officers, and are not now in existence. This statement is an error in fact and upon the record in this case. The Anaconda Copper Mining Company has appeared and filed its demurrer in the action. The record shows (page 40 of Transcript) that the Bitter Root Development Company, and the Anaconda Mining Company and the Anaconda Copper Company, could not be found in the District of Montana; but there is no allegation in the bill, or showing beyond this, and nothing to justify the statement that any of these corporations have no officer or officers, or have been dissolved.

Briefly, the facts in the bill of complaint of complainant in this case are as follows: It is alleged that at various times since the year 1888 one Marcus Daly, directly and through the vari-

ous corporations and other persons named in the bill, and the other defendants there named, excepting Margaret P. Daly, wilfully trespassed upon various lands belonging to complainant, and took and converted large quantities of logs which were manufactured into timber and lumber of various kinds, of a value in excess of two million dollars. It is alleged that Marcus Daly was the leading spirit in these trespasses and conversions, but it is charged in the bill that all of the defendants participated in the trespasses and conversions and in the division of the proceeds therefrom. It is also alleged that these trespasses were in part committed through other agents and contractors. It is also alleged that for the purpose of making proof of the illegal acts difficult, the said Marcus Daly organized the various corporations named as defendants, and caused various portions of their property to be transferred from one to the other of said corporations. It is also alleged in the bill that complainant had granted to the Bitter Root Development Company, appellee, licenses to cut timber on small portions of the tracts of land described in the bill of complaint, but that said appellee and other defendants had gone outside of the ground covered by said licenses or permits, and trespassed upon the other lands of the complainant, and removed the timber therefrom. The appellant, in said bill of complaint, further alleges that complainant has not evidence or knowledge of the exact ex-

tent of said trespasses or of the value of the proceeds received by defendants therefrom. The bill further alleges that complainant has commenced, and there are now pending in said lower circuit court, actions at law to recover the value of the timber so taken by defendants. The bill further shows that Marcus Daly died on November 12, 1900, leaving an estate worth about twelve million dollars, consisting of real and personal property, located in the County of Deer Lodge, District of Montana, and elsewhere; and that Margaret P. Daly, wife of said Marcus Daly has been appointed qualified and is now the duly qualified and acting executrix of the estate of said Marcus Daly, deceased, having been so appointed by the District Court of Deer Lodge County, District of Montana. There is no allegation of insolvency of any of the defendants, or of their inability to fully respond to any judgment which might be obtained upon the facts set forth in the bill of complaint.

ARGUMENT.

We submit that even a cursory examination of the bill of complaint in this case will convince this Honorable Court that the complainant has no standing in equity but has a full, complete and adequate remedy at law for the alleged wrongs set forth in the bill of complaint; and that the demurrers of appellees were well founded and were properly sustained by the lower court. We will briefly discuss the questions raised by said demurrers in the order in which they are discussed in the brief of appellant, filed herein.

THE COMPLAINANT HAS A FULL, COMPLETE AND ADEQUATE REMEDY AT LAW IN AN ACTION FOR DAMAGES.

There are a great many general statements and allegations in the bill of complaint wherein charges of fraud and conspiracy are made; and it is repeatedly stated in terms that the complainant has no plain, adequate and complete remedy at law, and that the redress which could be afforded by a court of equity would be more efficient; but, stripping the bill of complaint of these general statements and allegations, and looking at the facts pleaded, it will readily be seen that complainant's action is one at law for trespass and conversion; and that the only difficulty, if any, which would confront the complainant in

an immediate trial of the action before a jury, would be the obtaining of exact and detailed evidence of the alleged trespasses by defendants. The gist of the bill of complaint is simply that complainant is the owner of a large quantity of land which is, in the main, described by sections and quarter sections, in the District of Montana; and that the defendants have wrongfully and without right entered upon these lands, and despoiled them of the valuable timber growing thereon. Complainant's remedy for these wrongs is plainly in an action for trespass and conversion. It is purely and simply a legal cause of action, in which the right involved is a legal one, and which the defendants are entitled to have tried by a jury. The fact that a *large* number of sections of land is involved, and that the trespasses have extended over a period of years, would in nowise change the nature of the action. The only difference between this and an action in which one quarter section of land is involved, and where but one trespass upon that quarter section had been committed is that in this case more proof would have to be offered. If complainant has proof sufficient, there could be no difficulty in presenting it and having the redress granted in a court of law and before a jury. If complainant has not the proof (and that is the only obstacle in the way of an immediate trial, as appears upon the face of this bill) it can obtain this proof more readily through an action at

law than through one in equity. The parties in an action at law would be the same—no more and no less than are joined in this action—in equity, although it is not clear from the bill how the defendant Margaret P. Daly, individually, can be made a party to any action at law or in equity under the facts stated in this bill.

The doctrine is so well settled in England by the course and practice of the chancery court, and in this country by such course and practice, and also in the Federal Courts by direct inhibition by Act of Congress, that parties cannot be deprived of their right of trial by jury where there is an adequate and complete remedy at law; and that where the relief claimed can be obtained through an action at law, courts of equity will refuse to interfere, that we will consume but little of the time of the court in discussing the proposition. The reports of the cases decided by the Supreme Court of the United States teem with decisions of that court in cases of conversion, trespass, actions for damages for fraud and conspiracy and, in fact, cases of every conceivable kind, both in tort and on contract, holding that whenever a complete remedy can be obtained at law, and whenever a legal right is the basis of the main cause of action, a court of equity has no jurisdiction, but we will content ourselves with referring the court to a few of the decisions.

See:

Pomeroy on Equity Jurisprudence (2nd Ed) Vol. 1, Section 178;

Foster's Federal Practice, Sec. 12;

Bate's Federal Equity Practice, Sec. 188;

Buzard vs. Houston, 119 U. S., 347;

Insurance Company vs. Bailey, 13 Wall. 616;

Dowell vs. Mitchell, 105 U. S., 430;

Parkersburg vs. Brown, 106 U. S., 500;

Amber vs. Choteau, 107 U. S., 586;

Litchfield vs. Ballou, 114 U. S., 190;

Root vs. Michigan L. S. R. Co., 105 U. S., 189;

Thompson vs. Allen County, 115 U. S., 550;

Texas Pac. Ry. Co. vs. Marshall, 136 U. S., 393;

Dumont vs. Fry, 12 Fed., 21;

White vs. Boyce, 21 Fed., 298;

Alger vs. Anderson, 92 Fed., 696;

In Buzard vs. Houston, supra ,the Supreme Court, in part, says:

"In the Judiciary Act of 1879, by which the First Congress established the judicial courts of the United States, and defined their jurisdiction, it is enacted that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.'

The effect of the provision of the Judiciary Act as often stated by this court is that 'whenever a court of law is competent to take cognizance of a right, and has

power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' Hipp vs. Babin, 19 How., 271, 278. Ins. Co. v. Bailey, 13 Wal, 616, 621; Grand Chute v. Winnegar, 15 Wall., 373, 375; Lewis v. Cocks, 23 Wall., 466, 470; Root v. Railway Co., 105 U. S., 189, 212; Killian v. Ebbinghaus, 110 U. S., 568, 573. In a very recent case, the court said: 'This enactment certainly means something, and if only declaratory of what was always the law, it must, at least, have been intended to emphasise the rule and to impress it upon the attention of the court.' N. Y. Guarantee Co. v. Memphis Water Co., 107 U. S., 208, 215.

"Accordingly, a suit in equity, to enforce a legal right, can be brought only when the court can give more complete and effectual relief, in kind or in degree on the equity side than on the common law side; as, for instance, by compelling a specific performance, or the removal of a cloud on the title to real estate; or preventing an injury for which damages are not recoverable at law, as in Watson v. Southerland, 5 Wall., 74; or where an agreement procured by fraud is of a continuing nature; and its recission will prevent a multiplicity of suits, as in Boyce v. Grundy, 3 Pet. 210, 215, and in Jones v. Bolles, 9 Wall., 364, 369.

In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received. Parkersburg v. Brown, 106 U. S., 487, 500; Ambler v. Choteau, 107 U. S., 586; Litchfield v. Ballou, 114 U. S., 193."

In Insurance Company vs. Bailey, supra, the doctrine is briefly stated, as follows:

"Suits in equity, the Judiciary Act provides, shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law, and the same rule is applicable where the suit is prosecuted in the chancery court of this district. Much consideration was given to the construction of that section of the judiciary act in the case first referred to, and also to the question whether a party seeking to enforce a legal right could resort to equity in the first instance in a controversy where his remedy at law is complete, and the court without hesitation came to the conclusion that he could not, if his remedy at law was as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.

Most of the leading authorities were carefully examined on the occasion, and the court came to the following conclusion, which appears to be correct: That whenever a court of law in such a case is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must in general proceed at law, because the defendant, under such circumstances, has a right to a trial by jury (Citing) Foley v. Hill, 1 Phillipp, 399; S. S. 2 House of Lords Cases, 28; Fire Insurance Co., v. Delavan, 8 Paige Chancery, 422; Alexander v. Muirhead, 2 Dessausure, 162; 5 American Law Reg., 546."

In complainant's bill it is repeatedly stated that the remedy at law will not be adequate, and that for some

reason that does not appear from the bill it could not there obtain as complete redress as could be afforded by a court of equity. Upon the same proofs which must be presented to a court of equity, a judgment could be obtained in a court of law. A decree in equity would not more readily than the judgment in the action at law furnish the complainant a means of collecting a sum sufficient to compensate it for the injury done to its premises. We cannot conceive of a plainer case of legal right, or one where complainant's procedure at law would be simpler.

COMPLAINANT, PRESENTING ONLY AN UNLIQUIDATED CLAIM FOR DAMAGES, HAS NO STANDING IN A COURT OF EQUITY.

Before a party can come into a court of equity and seek relief he must reduce his claim, whether it be for unliquidated damages or upon contract, to judgment. In other words, his right to a recovery at all, whether it be in damages for tort or a recovery upon contract, is a legal right, and one triable by jury. And this right must be determined, and a judgment entered before he can seek the interposition of equity.

See:

Swan Land and Cattle Co. v. Frank, 148 U. S. 603;

Cates v. Allen, 149 U. S., 451;

Scott v. Neeley, 140 U. S., 106.

THE BILL CANNOT BE SUSTAINED ON THE GROUND THAT IT IS BROUGHT TO ESTABLISH A TRUST.

While there are some allegations in the bill of complaint to the effect that some of the property belonging to the Daly Estate, and the various corporations named as appellees, was acquired through the proceeds of trespasses upon complainant's lands, it is not urged in appellant's brief, and was not urged in the court below by appellant, that jurisdiction is claimed by reason of these allegations; but, in any event, such a contention could not be maintained upon the facts set forth in this bill of complaint.

In the first place, we know of no authority holding or intimating that a trust, constructive or otherwise, could arise through a trespass or conversion. It is only where property has been obtained through fraud or a breach of duty by one standing in a fiduciary capacity that the property thus obtained can be impressed with a trust for the benefit of the injured parties.

In the second place, there are no facts pleaded in this bill sufficient to justify any such relief. Whatever loss complainant may have suffered was the result of naked unlawful trespasses. It was not deprived of its property through any fraudulent misrepresentation or concealment, nor did any of the defendants stand in the position of agent or trustee of any sort to complainant. It is not

shown of what specific property complainant was deprived nor in what manner or into what property or character of property the same was converted. Appellant does not contend, and cannot contend, that by this bill it is seeking to follow any property of which it claims to have been deprived.

THE BILL OF COMPLAINT SHOWS THAT THE COMPLAINANT HAS ELECTED TO PROCEED AT LAW TO RECOVER THE DAMAGES TO WHICH IT IS ENTITLED.

The bill of complaint alleges that the complainant has commenced actions at law to recover the value of the timber taken by defendants, and that said actions are still pending. It is not only apparent from the facts stated in the bill that complainant has a complete remedy at law, but the bill shows that complainant has recognized that fact, and at the time of filing this bill in equity it had brought, and then had pending, actions at law to recover for the trespasses and conversions referred to in the bill. Even if equity had jurisdiction concurrent with law over these matters, after complainant has elected to proceed at law, it is precluded from going into equity. There is no reason shown in the bill, except the lack of evidence (and that could readily be obtained in a law action, as we will hereinafter show) why complainant does not prosecute these law actions to judgment; and certainly it could

there obtain all that could be afforded it by a court of equity. But, in any event, by making its election of remedies, conceding that there was a choice between law and equity, the complainant, upon this fact appearing, is properly relegated to the actions at law.

Pomeroy's Eq. Jurisprudence (2nd Ed) Vol. 1, Sec. 179.

NO EQUITY JURISDICTION ARISES BY REASON OF THE FACT THAT MARGARET P. DALY, APPELLEE, IS SUED AS EXECUTRIX OF THE ESTATE OF MARCUS DALY, DECEASED.

As the second ground for equity jurisdiction in the lower court, we find the more than novel proposition advanced in the brief of appellant that because of the fact that courts of chancery exercise jurisdiction over executors and administrators in certain cases, and because of the fact that Margaret P. Daly in this case is sued as executrix, therefore full jurisdiction over the entire controversy was vested in the lower court.

In support of this contention counsel for appellant cites a number of cases in which chancery courts have exercised jurisdiction over controversies in which executors and administrators were involved. This jurisdiction arises partially from the fact that the executor or administrator is considered a trustee for the heirs, distributees and creditors. As stated in the citations in appellant's

brief, and particularly in the excerpt from Pomeroy, on page 32, an executor is considered a trustee only for *legatees*, *distributees*, and *creditors*. A court of equity has not jurisdiction of every case brought against a trustee, but only of cases which grow out of the trust relation and by and between the parties between whom the trust really exists.

In this case Margaret P. Daly, as executrix, is in no sense of the word a trustee for complainant or any other party, who presents a claim in tort for unliquidated damages.

In an action at law, brought upon a legal right, an executor or administrator has the same right of trial by jury as any other party, and the action must be prosecuted at law. In this case Margaret P. Daly is sued as executrix, as are the other defendants, for damages for trespass and conversion committed by her intestate. If complainant recover judgment in the actions at law, this judgment would then be a debt against the estate, and payable as other debts out of the funds in the hands of the executrix. To uphold the apparent contention of counsel for appellant in this regard would be simply to hold that every action, brought against an executrix or other trustee of any character, whether brought by the *cestui que trust* or by an entire stranger to the trust, as is complainant in this case, could be maintained in a court of equity; and

that the courts of law are closed to executors and other trustees.

In this case there is no allegation that Mrs. Daly has concealed or misappropriated or misapplied any of the assets of the estate. The bill simply alleges, that as executrix she is now holding an estate of about twelve million dollars which was left by Marcus Daly, who was the principal party in the trespasses and conversions set forth in the bill of complaint. Even a creditor of an estate is not such a *cestui que trust* of the executrix as will enable him to maintain a bill in equity against the administrator for the establishing and payment of his claim, merely on the ground of trust relation, in the absence of charges of fraud, mal-administration or non-administration on the part of the executrix.

Walker v. Brown, 58 Fed., 23;

And the same case, affirmed by the Circuit Court of Appeals, in the 63rd Fed., 204.

Upon an examination of the authorities cited in this connection in appellant's brief, without referring to them in detail, it will be seen that in every case where jurisdiction was exercised by a court of equity in a case where an administrator was a party, it was not upon the sole ground of the trust relation, but because of other conditions which conferred jurisdiction upon the court. For instance, in some cases discovery of assets; in others discovery and

marshaling of assets and distribution among all of the creditors.

There is no charge of fraud against Mrs. Daly, as executrix. No discovery of assets is necessitated. She has ample funds to meet any judgment, which might be recovered.

Under the judicial systems in force in all the states of the United States, where probate courts are established for the purpose of administering upon estates of deceased persons and the distribution of the estates to heirs, creditors and other persons entitled thereto, what ground or reason can there be for seeking relief against an executrix in a court of equity upon a cause of action which can be prosecuted to judgment in an action at law? When the judgment is obtained, the claim can be presented and must be paid in due course by the executrix.

In the present case it is alleged that the executrix Margaret P. Daly has in her possession assets in amount about six times the aggregate of damages claimed by the complainant. That property is in the jurisdiction of the probate court of Montana in which the executrix was appointed. The federal court could simply enter a decree for that amount against the executrix; it could not reach out and take from the probate court of Montana a dollar of the money with which to satisfy that decree. Either as

a court of law or of equity the federal court could simply establish complainant's claim as a debt against the estate, and when it had done that its power would be exhausted under the facts alleged in this bill.

Byers v. McAuley, 149 U. S., 608.

NO JURISDICTION IS SHOWN BY THE BILL OF COMPLAINT UPON THE GROUND THAT COMPLAINANT IS ENTITLED TO INVOKE THE AID OF EQUITY FOR AN ACCOUNTING.

It is also contended in appellant's brief that the lower court had jurisdiction of this cause, and that the bill of complaint states grounds for equitable relief, because of the concurrent jurisdiction which the courts of equity exercise over matters of accounts and accounting.

In the first place, there is no relation between the complainant and the defendants, or any of them, which would support an action for accounting, either at common law or in equity. The defendants are charged in the bill as joint tort feasors. Complainant's action upon the facts alleged is for trespass and conversion. To maintain an action for accounting, either at law or in equity, there must be between the parties either a privity, by contract or consent, or a privity in law, such as a guardian, trustee or some other fiduciary relation. Against a defeasor or

mere wrong-doer no action for accounting will lie. The fact that the controversy embraces a series of torts, each of which would have to be proven by separate and distinct evidence, would not alter the nature of the case.

Whitwell v. Willard, 1 Met. (Mass) 216;

Stringham v. Winnebago County, 24 Wis. 594.

Conklin v. Busch, 8 Pa. St., 514.

Brinsmaid v. Mayo, 9 Vermont, 30.

It is true, as stated by counsel for appellant, that among the subjects over which equity exercises concurrent jurisdiction with the law is that of account or accounting. But, as in any other case, where the remedy at law is complete, equity cannot interpose. Wherever courts of equity have taken jurisdiction in matters of accounting, it has been for the reason that the accounting was mutual and intricate or, if upon one side only, great complexity or difficulty existed, that prevented a court of law or a jury from efficiently trying the same.

See:

Pomeroy's Eq. Jur. (2nd Ed.), Sec. 1421.

Washburn Mfg. Co. v. Freeman Wire Co., 41 Fed. 410;

Baker v. Biddle, 2 Fed. Cases, 764;

Ely v. Crane, 37 N. J. Eq., 157,

Paton v. Clark, 156 Pa., St., 49; 29 At. 116.

Lafond v. Lassere, 56 N. Y. S., 459;

Smith v. Bodin, 74 N. Y., 30.

In Washburn Mfg. Co. vs. Freeman Wire Company, 41 Fed., 410, supra, the rule is stated by Judge Thayer as follows:

> "A case does not become one of equitable cognizance merely because an accounting is prayed for or because it is proper or even necessary to take an account, as courts of law are competent to deal with suits of that character. * * * * * To authorize a decree for accounting, either as to profits or damages to which a complainant is entitled under the patent laws, the court must first acquire jurisdiction of the cause on some well defined equitable ground."

In each of the cases cited in appellant's brief where courts of equity have taken jurisdiction in cases of actions for accounting, it will be seen that the jurisidiction was based not upon the fact that the suit involved an accounting, but because in each case it was shown that the accounting could not be fairly and adequately had in a court of law, or that there was jurisdiction in equity, because of fiduciary relations between the parties, or on some other well settled ground for equitable interposition.

On page 35 of appellant's brief, a quotation is given from the opinion in the case reported in 5 Pet., 495, to the effect,

> "That in all cases in which an action for account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted."

From an examination of the case itself it will be seen

that this excerpt standing alone does not show the true meaning of the court. The decision clearly affirms the rule that it is not every transaction in which an account is to be adjusted which can be taken into a court of equity; but that some serious difficulty at law must interpose before recourse can be had to equity.

In the present case the acts complained of against the defendants were separate and distinct acts of trespass upon and conversions of complainant's property. The bill simply charges a series of torts extending over a period of years. Under no circumstances could the defendants be called upon to account to the complainant, either in an action at law or in equity. Complainant must present its proof and obtain its judgment for damages as for any other species of tort. But conceding that defendants could be called upon to account, what difficulty would be presented in trying the case in a court of law. The proof could be presented by complainant upon a series of trespasses the same as for one. We cannot see why a jury could not intelligibly render a verdict upon proofs properly presented for trespasses amounting to two million dollars as for any less sum; for trespasses covering a period of years as for any less period, and for trespasses great in number as for one trespass. The fact that the account involved a great number of items, all on one side, would surely not present a case beyond the ability of a jury to cope with. The aggregate of the items could certainly be presented by wit-

nesses, and nothing of difficulty left for the jury to do or determine.

But counsel for appellant seems to contend that the present case presents one of mutual accounts; and this is based upon the charge that the complainant had granted to the defendants licenses to cut timber on certain small portions of the tracts mentioned in the bill, and that instead of confining themselves to the ground covered by the licenses, the defendants entered upon other tracts adjacent thereto, and unlawfully took timber therefrom. How this presents a case of mutual account or mutual items of account we are unable to comprehend. As argued in a subsequent portion of appellant's brief, if the defendants cut any of the timber in question under the licenses or permits from the government, it is incumbent upon the defendants to set up and prove such permission, and that the cutting was done in accordance with such permission. If, in this case, the defendants should prove that they had a right to cut upon certain of the lands described in the bill of complaint, this would simply except from complainant's right of recovery the lands covered by the licenses, and would leave the case in the same condition as if the defendants met complainant's charges and proofs by evidence that upon a portion of the lands described in the bill of complaint they had not cut timber or trespassed at all. It certainly would not be presenting any cross-items or charges against the complainant, or presenting in any manner mutual

items or mutal accounts, or even credits in the ordinary sense of the term. Under the theory of complainant's counsel if the defendants should prove that the bill was entirely unfounded, and that they had not cut timber from any of the land mentioned in the bill, it would be presenting a case of mutual account.

THERE IS NO NECESSITY FOR A RESORT TO EQUITY IN ORDER TO PREVENT A MULTIPLICITY OF SUITS.

The fourth ground upon which appellant contends that the demurrers should have been overruled by the court below is that the bill shows that this action is necessary in order to avoid a multiplicity of actions at law.

In the first place, the bill alleges that actions at law have been commenced and are now pending to recover for these trespasses. From this allegation it must be presumed that the complainant has brought all the actions at law which can be brought, or which might be necessary to cover the trespasses complained of. As the complainant, before the filing of this bill, had brought all of the actions that it could bring against these defendants or any of them, it is difficult to see how this action could avoid a multiplicity of actions at law so far as these defendants are concerned.

In the second place, under the allegations of this bill no more actions at law would be necessitated than in equity. These defendants are liable, if liable at all, under the alle-

gations of this bill, as joint tort feasors and they are so charged. It is alleged that the individual defendants conspired together and jointly committed the acts or contributed to the commission of the acts complained of. The corporations are charged in the same manner. Under the allegations they are all jointly liable for the damages claimed to have been sustained by complainant; and they could certainly be made joint defendants in an action at law. The fact that the defendants committed a portion of the trespasses through agents and employes, or through contractors or persons whom they induced to cut the timber and then purchased the same from them, or that the timber was cut and purchased from persons, or taken from persons, who were induced by defendants to believe that defendants had a right to cut the same, in nowise changes the situation. If these facts are true, the defendants are liable directly and personally for the timber cut through agents and through contractors, the same as if they had personally and individually committed the trespasses.

If it is not necessary to join these various contractors and agents and employes in a bill of equity, in order to completely dispose of the matter, then it will certainly not be necessary to join them in actions at law, or to bring separate actions at law against them. If it would be necessary to sue all of these various other individuals and persons separately or jointly in actions at law, then they are

certainly indispensable parties to this or any other action in equity in order to completely dispose of the controversy.

The fact that the trespasses charged ran over a period of a good many years would necessitate but one action at law. The fact that the trespasses were committed upon numerous tracts of ground would make no difference, as the defendants could be sued in one action at law for all of the trespasses upon any or all of complainant's premises, whether on one or a thousand tracts, the same as they are attempted to be sued in this action in equity.

The cases cited by counsel for appellant in this action have no application, for the reason that this is not a case of one party having a right against a number of persons which could be determined as to all of the parties in one suit in equity, but at law would involve separate and distinct actions, and is not a case which involves a fund or property in which a great number of persons are interested; all of whom must be before the court in order to completely and effectually dispose of all contentions which might be raised as to the property or funds.

COMPLAINANT IS NOT ENTITLED TO DISCOVERY UNDER THE ALLEGATIONS OF THE BILL OF COMPLAINT.

The complainant's bill upon its face appears to be a bill for general relief in which the discovery sought is merely incidental.

But from the position taken by counsel for appellant in the lower court, and from portions of the bill itself, it would appear that the discovery is the main relief sought and desired by appellant. It is apparent from the bill that the only difficulty, if any, which would confront appellant in proceeding to immediate trial in an action at law, to recover for the torts set forth in the bill, is the lack of evidence. But upon an examination of the bill, we submit that it fairly appears that the case does not fall within any of the well-defined or recognized heads of equity jurisprudence cognizable in a federal court of equity; and therefore we can eliminate from the bill everything which supports the prayer for relief other than discovery; and, in that event, the entire bill must fail because it cannot be maintained for the sole purpose of discovery.

Complainant's remedy, being clearly in an action at law, there is no necessity for going into a court of equity to procure evidence in aid of that action. Prior to the passage of the Acts of Congress, making provision for the calling of parties as witnesses, and for the production of papers and documents, it was sometimes held that a court of equity would maintain a bill for discovery in aid of an action at law; but since the adoption of the provisions of Section 858 of the Revised Statutes of the United States, by which parties are placed upon the same plane as witnesses as any other persons, and the sections immediately subsequent to Section 858, providing for the production by witnesses of all books, papers and other documentary evidence, and of Section 724, providing for the production on notice of the books, papers, documents, etc., all necessary evidence and all information within the control of the opposing

parties may easily and readily be obtained in the action at law. And since the adoption of these statutes, the parties having full remedy in the law action, and there being no necessity for a recourse to equity, the courts of chancery, and particularly the Federal Courts, have clearly established the doctrine that a bill for discovery alone cannot be maintained.

Safford v. Ensign Mfg. Co., 120 Fed., 480;

Brown v. Swan, 10 Pet. (U. S.), 497.

Rindskoff v. Platto, 29 Fed., 130;

Preston v. Smith, 26 Fed., 885;

U. S. v. McLaughlin, 24 Fed., 823;

Ex parte Boyd, 105 U. S., 647;

Paton v. Majors, 46 Fed., 210;

Home Ins. Co. v. Stanchfield, 1 Dillon, 420;

Federal Case No. 6660.

In Safford v. Ensign Mfg. Co., supra, the court, through Circuit Judge Goff, says:

"It has been held that in ordinary cases a pure bill of discovery can no longer be maintained in the equity courts of the United States, because under section 724, Rev. St., it is no longer generally needed. See Rindskoph v. Platto (C. C.) 29 Fd. 130. * * * * From these cases I deduce the doctrine that in a case in which discovery and relief are sought, but the only ground for equitable relief appears to be a discovery of evidence to be used in the enforcement of a purely legal demand, the jurisdiction cannot be sustained. To sustain it would violate the doctrine laid down by Justice Field in Scott vs. Neely, supra, and would permit, by indirection the entertaining of a bill for discovery, although the trend of authority is that a pure bill for discov-

ery cannot be maintained in the federal courts, because it is no longer necessary. For these reasons, I am of opinion that the demurrer should be sustained and the bill dismissed." In Brown v. Swan, supra, the Supreme Court says:

"The jurisdiction of a court of equity in this regard rests upon the inability of the courts of common law to obtain or to compel such testimony to be given. It has no other foundation, and whenever a discovery of this kind is sought in equity, if it shall appear that the same facts could be obtained by the process of the courts of common law, it is an abuse of the powers of chancery to interfere. The courts of common law having full power to compel the attendance of witnesses, it follows that the aid of equity can alone be wanted for a discovery in those cases where there is no witness to prove what is sought from the conscience of an interested party."

The present case presents no exception to this rule. So far as the individual defendants are concerned, they can be called as witnesses and compelled to produce their books, papers, documents, and whatever knowledge they have that may be pertinent can readily be obtained in this manner.

So far as the corporation defendants are concerned, whatever knowledge they have must rest either with their officers and agents, past or present, or in their books, papers and documents. A corporation could have no knowledge outside of these sources. The books, papers and documents could be obtained upon demand and notice in the law action. The officers and agents, past or present, can be called as witnesses, and be compelled to produce whatever documentary evidence they may have.

If appellant's contention, that the prayer for accounting and allegations of necessity for discovery are sufficient to confer jurisdiction of this entire cause upon the lower Court, be maintained, then every action at law, to recover for trespasses or other series of torts, could be brought and maintained in equity by simply asking for an account, and alleging that it was neces-ary that plaintiff be permitted to secure evidence from the defendants. Upon allegations as to the necessity for discovery there can be no issue or trial. Upon a bill properly framed, the defendants must make the discovery in their answer. All that need be alleged concerning the account, is that complainant needs and desires it. So that, if this doctrine prevail, in this class of cases, and in fact in all cases, even where the purest of legal rights are involved, parties could be deprived of their right of trial by jury, simply by an ingenious framing of a *so-called* bill in equity.

So that whether the element of discovery, under this bill, is considered as standing alone, or as claimed by counsel for appellant to be sufficient to confer jurisdiction of the entire controversy upon the court and to warrant the court in proceeding to grant all of the relief prayed for, we submit that the jurisdiction of a federal court of equity is in no wise aided by the allegations of the bill looking to a discovery.

In addition, under the Supreme Court Equity Rule numbered 40, as it stands since its repeal, or partial repeal, and under rule numbered 41, where a complainant desires to obtain specific discovery by defendants of any facts, special interrogatories must be framed and specified in a note at the foot of the bill.

See, Daly v. Young, Fed. Case, 751.

In the case at bar, there being no special interrogatories directed to any of the defendants, it is doubtful whether any discovery could be claimed in this action beyond such books, papers and documents and documentary evidence as defendants might have; and these could readily be obtained as before stated, by demand and notice in the action at law.

Counsel for appellant has cited a number of cases to the effect that even since the passage of the Revised Statutes, Sections 724, 858, etc., the federal equity courts have compelled discoveries. Upon an examination of these cases it will be seen that in each case the main relief asked was based upon some well-settled head of equity jurisprudence; and the discovery sought merely incidental to the main relief asked; and the court simply held that, having obtained jurisdiction of the action in equity, and it being a proper case for equitable relief, the court would then proceed to grant discovery or any other incidental relief prayed for.

We have been unable to find a single authority, State or Federal, holding that for pure discovery alone a bill can be maintained.

(a). There is a further ground for denying the complainant's right to maintain this bill for discovery, and that is, that the defendants cannot be compelled to answer upon any matters or to disclose any evidence which might subject them or might tend to subject them to, or in any way lay the basis for, criminal prosecutions or other proceeding which might result in the imposing of a penalty.

In this case the bill alleges (Trans. p. 30) that the acts of the defendants were "in violation of the laws of the United States, both civil and criminal." Outside of this specific allegation it is apparent upon the face of this bill that any evidence, which might be disclosed, or which would show or tend to show that the defendants had wrongfully entered upon the public domain and cut and removed timber therefrom, would subject them to criminal prosecution for such trespasses. Neither upon the witness stand, nor through the means of discovery in equity, could the defendants be compelled to incriminate themselves by answer or by production of any documentary evidence.

See,

Bates' Fed. Eq. Prac., Sec. 136 and Sec. 266;
Foster's Fed. Prac. (3rd Ed.), Vol. 1, p. 290;
Boyd v. U. S., 116 U. S., 616;
Lees v. U. S., 150 U. S., 476 and 478;
Leggett v. Postley 2 Paige Ch., 599;
Livingstone v. Harris, 3 Paige Ch., 528;
State v. Saline Bank, 1 Pet., 100.
Warren v. Holbrook, 95 Mich., 195; 54 N. W., 712.

But counsel for appellant argues that where the criminal prosecution or liability to penalty is barred by lapse of time, the defendants cannot escape making discovery.

Upon the bill of complaint in this action it clearly appears that the acts complained of are crimes. The bill does not show when the acts were committed. In other words, it cannot be determined from the bill of complainant that the statute of

limitations has run as to the acts upon which discovery is sought, and there certainly can be no presumption indulged in that criminal prosecutions are barred.

Again, counsel for appellant argues that as to Margaret P. Daly, executrix, there can be no criminal prosecution or accusation. In some portions of the bill it is alleged (one allegation being found on page 30 of Transcript) that all of the defendants participated in these trespasses. But if nothing personal is intended to be charged against Mrs. Daly in the bill, we submit that the facts alleged are insufficient to compel any discovery or disclosure from Mrs. Daly, because it is not shown that she has any personal knowledge or books or other documentary evidence pertinent to the issue.

Certainly the other defendants, both individuals and corporations, would lay themselves liable to criminal prosecution if they were able to reveal facts as charged in the bill.

(b). *Complainant is not entitled to a discovery for the further reason that the bill is insufficient to show that the discovery is sought in aid of any action at law, conceding for the purpose of this argument that a discovery could be maintained in aid of such action.*

The bill alleges that law actions have been brought, and are now pending, against the defendants, or some of them, to recover for the trespasses referred to in the bill. But, while this allegation is undoubtedly sufficient to show that a recovery is being sought at law for the trespasses complained of, in order to obtain a discovery from any of these defendants it is neces-

sary that the bill allege that said defendants are parties to the law actions, and that this action is ancillary to and in aid thereof.

1 Bates' Fed. Eq. Prac., Sec. 199, page 266.

COMPLAINANTS CANNOT INVOKE THE AID OF EQUITY BY REASON OF ANY FRAUD, MISREPRESENTATION OR CONCEALMENT ALLEGED IN ITS BILL OF COMPLAINT.

The learned counsel for appellant argues briefly that because of the jurisdiction exercised by courts of equity in cases of fraud, misrepresentation and concealment, the lower court should have taken jurisdiction of this action upon that ground.

In the first place, there is no allegation in the bill that any fraud, misrepresentation or concealment in any way enters into complainant's cause of action. The cause of action is in tort for damages for wilful, bold and naked trespasses and conversions. There is no charge that the defendants secured possession of complainant's ground, or were assisted or enabled in any way in the taking and conversion of complainant's property by means of any fraud or fraudulent statement or acts or misrepresentations or concealment. The only fraud, misrepresentation and concealment referred to in the bill was that the cutting was done through the cloak of corporations and various persons, and that the transactions were carried on in such a manner that it was made difficult for complainant to procure satisfactory evidence to support its cause of action.

This suit is not brought on account of the suppression of evidence, or of any fraud, misrepresentation and concealment in connection therewith, but is brought to recover for the wrongful trespasses upon, and the taking of plaintiff's property and the conversion thereof.

Even if a fraud or concealment entered into the cause of action; as stated in Buzard v. Houston, 119 U. S., 347, it is not every case of fraud which is cognizable in a court of equity. Actions for damages sustained through fraud; actions of deceit, and, in fact, every cause of action, whether it arises through fraud or otherwise, where the remedy is a legal one for damages, must be brought and prosecuted at law.

Further, the allegations of the bill as to fraud, misrepresentation and concealment, are too general and indefinite to sustain the bill upon this ground. While it is true that the evidence itself of a fraud need not be pleaded, still the bill must allege the specific acts or language which constitute the fraud, and not the mere unsustained conclusion of the pleader that fraud has been committed.

In this bill there is no statement as to what any of the defendants actually did which amounted to a fraud upon the government,—how, where or when it was done; but simply the allegation that certain results were accomplished in fraud of complainant's rights.

THE BILL IS SO GENERAL, UNCERTAIN AND INDEFINITE THAT IT PRESENTS NO GROUNDS FOR RELIEF OR DISCOVERY IN EQUITY.

Certain objections, upon the grounds of uncertainty and insufficiency are presented against the bill in this case, by the demurrers filed, and while it is clear that the demurrers in this respect are well founded, and that the bill in many respects is insufficient and uncertain, we regard the propositions heretofore issued, so clearly decisive of our contention that under this bill, complainant has no standing in a court of equity, that we do not feel justified n arguing these objections at length.

But we respectfully submit that a mere reading of the bill will disclose that no attempt is made to allege how any of the alleged acts of defendants were fraudulent or how complainant was injured by any of the alleged acts of conspiracy or fraud, or how any acts of the defendants, in organizing corporations or otherwise, complicated the situation or made detection difficult or impossible, or concealed from complainant any facts in the case. Nor is it sufficiently averred how the alleged frauds were committed or what means were used to conceal them. There are no facts alleged in the bill which would enable the Court to determine for itself that frauds had been committed or a conspiracy organized and carried out which resulted in any injury to complainant. In fact it appears from the bill that whatever difficulty complainant may be laboring under, is not due to any acts of defendants but to complainant's delay and negligence in not sooner asserting its rights, if any it has, and in not soner obtaining and preserving evidence with which to pros-

ecute any violation of those rights. The bill is also uncertain and insufficient in that it shows that from portions of the lands described in the bill, defendants have the right to cut timber by reason of direct permits and license issued by the complainant. Knowledge of what these permits are must lie with complainant, and as complainant shows by the bill that it does not intend to dispute the permits or the rights granted thereunder, we submit that the bill should show what lands should be excepted from it, and should be confined to premises concerning which complainant alleges it has a cause of action.

We respectfully submit that irrespective of the jurisdictional defects in said bill, that the said demurrers were well founded, because of the uncertainty and insufficiency of the bill.

In conclusion, we respectfully submit that the only resemblance which the bill of complaint in this case bears to a bill sustainable in equity is in its form and in the ingenuity displayed by counsel in the frequent use of terms encountered in equity practice, such as "fraud," "account," "trust," etc., and stripping the bill of all unnecesary phraseology and verbiage, and looking only to the facts alleged, the controversy presented is reduced to a simple, naked, concrete proposition of law. It presents a claim or money demand for unliquidated damages growing out of wilful trespasses and conversions supportable in a court of law alone. Complainant has recognized this by already filing its law actions. There is no equity presented; no reason for asking the interposition of a court of equity,, and we respectfully submit that the action of the lower

court in sustaining the demurrers, and dismissing the bill, was proper, and should be approved and affirmed by this Honorable Court.

Respectfully submitted,

W. W. DIXON, A. J. CAMPBELL, A. J. SHORES, C. F. KELLEY, JOHN F. FORBIS and L. O. EVANS,
of Butte, Montana, Solicitors and of Counsel for Appellees.